BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the matter of	)	
	)	
Framework for Broadband Internet Service	)	GN Docket No. 10-127
	)	

REPLY COMMENTS OF THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

On June 17, 2010, the Federal Communications Commission ("Commission") adopted and released a notice of inquiry ("NOI") seeking comment on the appropriate means to consider the appropriate regulatory structure and legal framework the Commission should apply to broadband service providers in order to promote investment and protect consumers of broadband Internet service.[1] The Washington Utilities and Transportation Commission ("UTC") appreciates the opportunity to submit these reply comments regarding certain issues raised in the NOI.[2]

A. Introduction

As noted by the Commission, the current legal classification of broadband Internet service was developed more than a decade ago, and Congress has subsequently upheld the Commission's increasingly important role regarding broadband service providers and their consumers. Indeed, the Commission developed the National Broadband Plan recommending

[1] Notice of Inquiry, *In the Matter of the Framework for Broadband Internet Service,* GN Docket 10 127, rel. June 17, 2010.

[2] The UTC has authority to "participate in proceedings before federal administrative agencies in which there is at issue the authority, rates or practices for . . . utility services affecting the interests of the state of Washington, its businesses and general public, and to do all things necessary in its opinion to present to such federal administrative agencies all facts bearing on such issues . . . ." RCW 80.01.075.

specific agency actions to encourage broadband deployment and adoption as a specific response to provisions arising from the American Recovery and Reinvestment Act of 2009.[3]

In this proceeding, the Commission seeks comment on three specific approaches that could be applied prospectively to broadband service providers by determining:

(a) whether the current "information service" classification of broadband Internet service remains adequate to support effective performance of the Commission's responsibilities, or

(b) whether the legal and practical consequences of classifying Internet connectivity service as a "telecommunications service" to which all the requirements of Title II of the Communications Act should apply, or

(c) whether there is a lawful "third way" under which the Commission would affirmatively determine that Internet connectivity service is offered as part of wired broadband Internet service and that this connectivity service should be treated as a telecommunications service to which the Commission would forbear from application of a number of regulations applying to telecommunications service under Section 10 of the Communications Act[4] while retaining application of other provisions of Title II that are needed to implement universal service, promote competition, and provide meaningful consumer protection policies.

Additionally, the Commission seeks comment on a number of issues including, most importantly, the states' proper role with respect to broadband Internet service.

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[3] *See* American Recovery and Reinvestment Act of 2009 § 6001, 47 U.S.C. § 1305(k)(2)(A), (D) (2010).
[4] 47 U.S.C. § 160.

B. The Commission's "Third Way" is both Legally Supportable and Reflects Sound Public Policy.

As would be expected, the Commission's proposal has both broad support and significant opposition. For the most part, the nation's broadband Internet service providers actively oppose the "third way" proposal, while other commenting parties, such as the National Association of State Consumer Advocates (NASUCA), several states, certain Internet edge providers, and other public interest groups, support the proposal. Having reviewed the comments submitted by various parties and for the reasons set forth below, the UTC supports the Commission's effort to establish a meaningful "third way" to address the complex legal and regulatory issues surrounding broadband service and its increasing role in the economic and social fabric of our nation.

The UTC shares the view of those commenting parties that suggest reclassification of broadband Internet service as under Title II of the Communications Act (Act) subject only to certain regulatory requirements would provide a greater legal and policy foundation for such offerings. Doing so would diminish the present uncertainties and continuing legal disputes surrounding broadband Internet service's classification under Title I of the Act. As NASUCA points out:

> A common carrier or separation regime under Title II, applied directly rather than under Title I ancillary jurisdiction, has the further virtue of reducing the uninformed chatter about the Commission "regulating the Internet." A direct Title II approach would make clear that the Commission was *not* regulating the Internet, i.e., the content carried on the wires, but merely the wires themselves, i.e., the underlying transmission network or physical layer.[5]

Despite the carriers' protestations, no commenting party advocates or supports reclassification of broadband Internet service in order to apply the full array of Title II

[5] Comments of the National Association of State Utility Consumer Advocates, GN Docket No. 10-127, submitted July 15, 2010, page 21.

regulations to the service, particularly those aspects of Title II of the Act that pertain to economic regulation. Rather, as the California Public Utilities Commission (CPUC) points out, "the FCC may use its Title II authority to regulate broadband Internet access service, and if the FCC uses its Title II authority it should forbear from rate regulation and other aspects of that historical regulatory regime."[6] Similarly, while supporting reclassification, the Pennsylvania Public Utility Commission specifically acknowledges that "the traditional panoply of pricing and tariffing in place under the current common carriage approach may not be appropriate."[7]

Not a single party supporting reclassification of broadband to Title II endorses regulation for regulation's sake. Rather, what is common to the comments of those parties supporting the "third way" is that certain elements of Title II regulation continue to be highly relevant in an increasingly broadband-centric environment and these provisions should be applied prospectively to the wireline and wireless broadband Internet service offerings under Title II of the Act. As the CPUC notes, there remain a number of areas of federal and state regulations that should be retained and applied, perhaps, in some reduced fashion. These include, but are not limited to, Sections 254 - Universal Service, 255 - Disabilities, 222 – Privacy, 201 – Unjust and Unreasonable Charges, 202 – Unreasonable Discrimination, 251 – Interconnection, and federal and state statutes applying to basic consumer protection, public safety, telephone numbering and service quality.[8] Should the Commission adopt the "third way" and move forward with a Notice of Proposed Rulemaking (NPRM), the UTC shares the CPUC's and others' views that the Commission's forbearance examination should carefully assess the merits of each of these long standing, albeit non-economic, regulatory requirements in a broadband era.

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[6] Comments of the California Public Utilities Commission and the People of the State of California, GN Docket No. 10-127, submitted July 15, 2010, pages 6 – 7.
[7] Comments of the Pennsylvania Public Utility Commission, GN Docket No. 10-127, submitted July 15, 2010, page 3.
[8] CPUC comments at pp. 8 – 18.

C. Any Contemplated Forbearance Associated with the "Third Way" Should Ensure a Continuing Role for States.

On July 21, 2010, the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC) passed a resolution urging the Commission to refrain from preempting state commissions from jurisdiction over broadband Internet services.[9] While the NARUC resolution is couched as opposition to potentially sweeping preemption of any state commission oversight of broadband Internet service, the resolution also reflects NARUC's desire to preserve those existing regulatory functions where states are most effective. Additionally, while a number of the parties' comments reflect broad support for a new regulatory approach that maintains open Internet policies, encourages providers to continue to expand the availability and adoption of broadband Internet service, several commenters support continuation of federal and state regulatory requirements designed to provide meaningful consumer protections, ensure public safety, and maintain important conditions for designating carriers eligible to receive valuable federal subsidy funding that will increasingly be shifted to support of broadband Internet service.[10] The UTC believes that in meeting each of these objectives there remains a need for meaningful sharing of state and federal responsibility over telecommunications based on the relevant competencies existing at each governmental level.

In terms of consumer protection, the UTC agrees with the CPUC's contention that state commissions "historically have had a strong role in establishing and enforcing consumer protection issues pertaining to the provision of traditional wireline service offered over the PSTN."[11] Any new regulatory framework should allow the States to continue to address

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[9] Notice of Ex Parte Communication [?]submitted by the National Association of Regulatory Utility Commissioners, Transmittal of *Resolution Opposing Federal Preemption of States' Jurisdiction over Broadband Internet Connectivity Service*, filed July 26, 2010.

[10] NASUCA comments at p. 22, Public Knowledge comments at pages 38 –43.

[11] CPUC comments at page 11.

consumer protection, which includes a form of alternative dispute resolution between consumers and providers. There is nothing unique or different about a broadband connection when compared to traditional narrowband voice services that are subject to state consumer protection laws, and the Commission should maintain the historical model in dealing with disputes or problems encountered by consumers when utilizing broadband Internet services.

Similarly, under Section 254 of the Act, state commissions have been the gatekeepers to both incumbent and new entrant providers' efforts to receive federal universal service funding. As the Commission looks to re-target funding and establish a new mechanism to support widespread availability of broadband Internet services, state commissions should retain their traditional role in reviewing and evaluating eligible telecommunications carrier (ETC) applications and annual re-certifications.

D. Conclusion

Accordingly, the UTC supports classification of Internet broadband service as a Title II telecommunications service, with appropriate Commission forbearance from enforcement of several provisions of the federal Telecommunications Act that maintains a meaningful role for the states. The UTC believes that reclassification of these services is both necessary and timely given the ambitious goals set forth in the NBP. Moreover, such an approach should preserve traditional and legitimate roles of states under the Act and provide more certainty to broadband providers about the scope of the regulatory environment.

Respectfully submitted this 12th day of August, 2010

By: _____

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